WISCONSIN SUPREME COURT
WEDNESDAY, DECEMBER 3, 2003
11 a.m.

00-2426 In re the Commitment of Gregory J. Franklin: State v. Franklin

This is a review of a decision from the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a ruling of the Milwaukee County Circuit Court, Judge Dennis P. Moroney presiding.

In this case, the Wisconsin Supreme Court will decide whether evidence of past crimes and wrongdoings – known as "other acts evidence" – may be presented to a jury in a proceeding to decide whether an individual should be committed for treatment as a sexual predator.

Here is the background: In 1998, prosecutors filed a request in the Milwaukee County Circuit Court seeking to have Gregory J. Franklin declared a sexually violent person. If granted, this request – called a Chapter 980 petition – would result in Franklin being committed to a mental institution after he finished serving his prison sentence. The petition alleged that he had a mental disorder (schizophrenia) and abused alcohol and other drugs, all of which made it difficult for him to control his actions and increased the likelihood that he would commit more sex crimes.

When the petition was filed, Franklin was nearing the end of his sentence for second-degree sexual assault and attempted second-degree sexual assault. Prior to this, he had served a sentence for first-degree sexual assault.

A jury trial was held and the jury found Franklin to be a sexually violent person. During the course of the trial, the judge granted the State permission to show the jury several reports that had been compiled on Franklin when he was sentenced for unrelated past crimes. The reports – called presentence investigations – contained a variety of information on Franklin's mental health, his record as a juvenile, his complete adult criminal record, and more.

Franklin objected to admitting this material into evidence. He argued in the trial court, in the Court of Appeals, and again in his filings in the Supreme Court, that information on his unrelated past crimes and his conduct in prison was irrelevant to the question of whether he had a disorder that required commitment to a mental institution. He argued that presenting this information prejudiced the jury against him.

The Court of Appeals affirmed the trial court, but the judges who handled this case wrote three separate opinions each with different reasons. They noted that Wisconsin law[1] prohibits prosecutors, in an ordinary criminal trial, from using evidence of an individual's other crimes or wrongdoings in order to prove that the person has a bad character and therefore likely committed the current crime, but concluded that this "other acts evidence" may be introduced in a Chapter 980 commitment proceeding.

The Supreme Court will now consider this issue and clarify, especially in light of the appellate judges' different approaches, whether "other acts evidence" is permissible in a Chapter 980 petition.

[1] Wis. Stats. § 904.01

WISCONSIN SUPREME COURT
THURSDAY, DECEMBER 4, 2003
9:45 a.m.

02-1618 State ex rel. Richard W. Ziervogel, et al v. Washington County Board of Adjustment, et al

This is a review of a decision from the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed an order of the Washington County Circuit Court, Judge David C. Resheske presiding.

In this case, the Wisconsin Supreme Court will decide whether the owners of a lakeside home that sits too close to the shore (through no fault of their own) should be permitted to add a strictly vertical addition to the property. The Court is further expected to clarify what a local board of adjustment is required to consider in weighing requests for zoning variances.

Here is the background: the plaintiffs, Richard W. Ziervogel and Maureen A. McGinnity, own a house on Big Cedar Lake in Washington County. They want to build a 10-foot vertical addition to the home to add a bedroom, bathroom, and office space. When they purchased the house, it met all requirements of the local zoning ordinances but in June 2001, Washington County amended the ordinance to prohibit any expansion of any portion of an existing structure that sits within 50 feet of the ordinary high watermark. This house sits 26 feet from the ordinary high watermark.

They applied for a permit to build their addition in September 2001 and it was denied. They went to the Washington County Board of Adjustment for a variance (a document from the zoning authority that grants permission to property owners who demonstrate a hardship to do something that otherwise would be prohibited under the zoning regulations) and that, too, was denied following a public hearing. At the hearing, a letter from the Department of Natural Resources recommending denial was read aloud. Ziervogel and McGinnity argued that their requested variance would not bring the house any closer to the shoreline and did not raise objections from the neighbors.

The board denied the variance request because it found that the property owners were not facing an unnecessary hardship. State law gives county boards of adjustment the authority to grant variances as a safety valve, for people who need to make changes to their property in order to be able to use it. These are known as "unnecessary hardship" situations. This is defined in the Washington County Code as:

> Any unique and extreme inability to conform to the provisions of this chapter due to special conditions affecting a particular property which were not self-created and are not solely related to economic gain or loss. Unnecessary hardship is present only where, in the absence of a variance, no reasonable use can be made of the property.

Ziervogel and McGinnity appealed the board's decision first to the circuit court and then to the Court of Appeals. Both affirmed. The homeowners now have come to the

Supreme Court, arguing that the Court's past decisions[2] require zoning boards to use a two-part test in weighing variance requests, which the Washington County Board of Adjustment did not do. The two-part test, according to the plaintiffs, requires that the board first determine whether the proposed variance violates the purpose of the zoning ordinance and second – only if the answer to the first question is "yes" – determine if there is an unnecessary hardship. The Supreme Court will clarify what boards of adjustment must consider in weighing requests for variances.

[2] State v. Kenosha County Board of Adjustment, 218 Wis. 2d 396, 577 N.W.2d 813 (1998) and State v. Outagamie County Board of Adjustment, 2001 WI 78

WISCONSIN SUPREME COURT
THURSDAY, DECEMBER 4, 2003
10:45 a.m.

02-2400 State v. Waushara County Board of Adjustment, et al

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a judgment of the Waushara County Circuit Court, Judge Lewis R. Murach presiding.

This case, like the other that the Supreme Court will hear this morning, involves a lakeside home that the owners wish to expand in a manner that will not bring the house closer to the shoreline. The Court will decide whether the homeowners should be allowed to do this, and will clarify what standards a local board of adjustment should apply in considering an application for an area variance.

A variance is a document from the zoning authority that grants permission to property owners who demonstrate a hardship to do something that otherwise would be prohibited under the zoning regulations. Variances may be granted to permit certain uses of the property, or to permit the owner to alter structures built on the property.

Here is the background: G. Edwin and Suzanne Howe own property on Silver Lake along Highway 73 in Waushara County. A local ordinance requires that lakefront properties be at least 35 feet from the shoreline and 110 feet from the highway, but the Howe home, which was built before this law was passed, is on a lot that is too small to permit setbacks of that size. Over the years, the Howes have made two additions to the home, each time obtaining a variance for the construction.

In fall 2001, the Howes requested and obtained a variance to build a 10-by-20-foot addition to their living room and to extend the porch to the end of the house. This change would not bring the house any closer to the lake or the road. The Waushara County Board of Adjustment determined that, without a variance, the Howes would suffer an unnecessary hardship.

The state Department of Natural Resources, which has the authority under state law to step in when it determines that a variance has violated the public interest, objected to this variance and brought the matter to the circuit court, which reversed the board's decision. The circuit court concluded that it was not enough for the Howes to show that they would suffer an unnecessary hardship without the variance. They needed to demonstrate, the judge ruled, that they would have no reasonable use of the property. The Howes then appealed to the Court of Appeals, which affirmed the circuit court.

In deciding this case, the Supreme Court will clarify whether the standard for granting a variance is (1) that without a variance, the property owner would face an unnecessary hardship, or (2) that without a variance, the property owner would have no reasonable use of the property.

WISCONSIN SUPREME COURT
THURSDAY, DECEMBER 4, 2003
1:30 p.m.

02-0979 Town of Delafield v. Eric and Christine Winkelman

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a decision of the Waukesha County Circuit Court, Judge Robert G. Mawdsley presiding.

In this case, the Wisconsin Supreme Court will determine whether a property owner who has violated a local zoning ordinance code has the right to contest the enforcement of that ordinance.

Here is the background: Eric and Christine Winkelman own a piece of land in the Town of Delafield. There are two houses on the land, and they are considered "legal, but non-conforming," which means that they are violating existing zoning laws (the law permits just one house per lot) but were built before the current law went into effect. When this case began, the Winkelmans were living in one of the homes and renting out the other. They now live elsewhere.

In 1991, the Winkelmans obtained a building permit for interior remodeling in both homes. After the work began, the town's building inspector discovered that the remodeling involved non-conforming structures and issued a "stop work" order.

The Winkelmans sought a variance from the town zoning board. The board in September 1994 granted the variance in part, but on the condition that the rental house be removed within three years. Three years passed, and the house remained. They received an extension through April 1999 and still did not remove it. The board then obtained a court order authorizing the town to tear down the house if the Winkelmans did not.

The Winkelmans appealed, and the Court of Appeals reversed the circuit court decision, finding that the town had not followed the appropriate procedures. The town went back to the circuit court and took the steps indicated by the Court of Appeals. The circuit court again entered an order in favor of razing the residence, the Winkelmans again appealed, and the Court of Appeals again reversed – this time finding that the circuit court should have permitted the Winkelmans to make an argument against the tear-down.

The Town of Delafield now has appealed to the Supreme Court, which will decide whether, when a circuit court is asked to grant an order in a case involving an established violation of the zoning code, the circuit court must allow the property owner to present a defense.

WISCONSIN SUPREME COURT
WEDNESDAY, DECEMBER 17, 2003
9:45 a.m.

02-1727 Kenosha Hospital & Medical Center v. Jesus E. Garcia, et al

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a judgment of the Kenosha County Circuit Court, Judge David M. Bastianelli presiding.

In this case, the Wisconsin Supreme Court will determine whether a notice of garnishment was properly served and whether a default judgment against the employer who was ordered to garnish the wages (and did not) was proper.

Garnishment is a means of satisfying a debt. The individual who is owed money goes to court, proves that the money is owed, and obtains a judgment that allows him/her to tap into the debtor's property, money, or credits through a third party (usually the debtor's employer).

Here is the background: In June 2001, Kenosha Hospital & Medical Center filed paperwork to garnish the wages of Jesus E. Garcia to collect $20,888.85 in unpaid medical bills. Two months later, the circuit court entered a judgment in the hospital's favor and a garnishment notice was served on the payroll department at Richter Industries, Inc., the Kenosha factory where Garcia worked. Richter failed to respond to the garnishment and the hospital went back to court, obtaining a default judgment against Richter for the full amount owed by Garcia.

Three days after this judgment was entered against Richter, the circuit court received notice that Garcia had filed for bankruptcy in the U.S. Bankruptcy Court. Richter then filed a motion to undo the judgment against it, arguing that (1) the original garnishment papers had not been served properly because they were presented to a secretary at the company's Kenosha factory and not brought to corporate headquarters in Illinois; and (2) the proceedings should have been put on hold because of the bankruptcy filing (filing for bankruptcy triggers an automatic suspension of creditors' proceedings).

Following a hearing, the circuit court denied Richter's motion to vacate the default judgment. Richter appealed, and the Court of Appeals affirmed the circuit court's decision.

In the Supreme Court, Richter again raises arguments about the manner in which the garnishment notice was served and about the impact of the bankruptcy filing. The company also argues that it is unjust to make it responsible for the full amount of Garcia's medical debt.

The Supreme Court will clarify the garnishment process, determine whether the bankruptcy filing was properly considered, and determine whether the default judgment against the employer in this case was appropriate.

WISCONSIN SUPREME COURT
WEDNESDAY, DECEMBER 17, 2003
10:45 a.m.

01-3093-CR & 01-3094-CR State v. Victor Naydihor

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a conviction in Kenosha County Circuit Court, Judge Bruce E. Schroeder presiding.

This case involves a man who was convicted of a crime, sentenced to prison, successfully argued to have that sentence vacated (cancelled), and then received a longer prison term when the sentence was redone. The Supreme Court will decide whether this was appropriate.

Here is the background: On Feb. 25, 2000, Victor Naydihor drove drunk and caused a crash that injured two people. He agreed to plead guilty to one charge of causing great bodily harm by the intoxicated use of a motor vehicle and, in return, the State agreed to dismiss the remaining charges. The State also agreed to recommend probation, but retained a free hand to recommend conditions of probation – such as jail time. Defendants may be given up to a year in the county jail as a condition of probation.

Naydihor pleaded guilty on April 7, 2000, and Judge Barbara A. Kluka ordered a pre-sentence investigation. These investigations are performed by the Department of Corrections and they provide the judge with information on the impact of the crime as well as information on the defendant, including criminal history, medical conditions, family background, and more. They also contain a sentencing recommendation.

At the sentencing hearing, the prosecutor told the judge that the State had offered the plea agreement to Naydihor without realizing the extent of his prior record. Indeed, the pre-sentence investigation recommended a harsher sentence. While the prosecutor argued for probation with jail time, as he had agreed to do, Kluka rejected this recommendation noting that the victim would be in a wheelchair for at least six months and that she would be unable to care for her blind spouse. Kluka sentenced Naydihor to a three-year term of initial confinement followed by five years of extended supervision (ES).

Naydihor filed a motion to vacate the sentence, arguing that the prosecutor had broken the plea agreement by mentioning Naydihor's past criminal record in court. Kluka granted Naydihor's motion and requested that the case be assigned to a different judge for resentencing.

Judge Bruce Schroeder presided in the resentencing and increased Naydihor's prison time by two years, giving Naydihor five years' initial confinement. Schroeder based his decision on testimony from the victim. She revealed that she might never walk again, was unable to work, and that her medical expenses of about $70,000 had not been covered by her auto insurance.

Naydihor appealed, arguing that (1) the prosecutor had breached the plea agreement by mentioning his criminal past, and (2) the second judge did not have the authority to impose a harsher sentence. On the first issue, after noting that "while a

prosecutor need not enthusiastically recommend a plea agreement, he or she may not perform an 'end run' around a plea agreement by covertly conveying to the trial court that a more severe sentence is warranted than that recommended," the Court of Appeals concluded that the prosecutor's comments in this case were reasonable because he had maintained a free hand in the plea agreement to argue for conditions of probation.

On the second issue, the Court of Appeals concluded that case law[3] permits a judge, on resentencing, to consider any relevant information that has come to light following the original sentence.

In his appeal to the Supreme Court, Naydihor argues that federal case law[4] prohibits a court from increasing a sentence unless there is new, objective information concerning the defendant's conduct between the original and new sentencing hearings. Nothing presented to the second judge about the victim's medical or financial condition, Naydihor argues, was substantively different than what was before the first judge. Therefore, he reasons, the harsher sentence was not justified. The Supreme Court will clarify the circumstances under which a vacated sentence may be increased during resentencing.

[3] State v. Leonard, 39 Wis. 2d 461, 159 N.W.2d 577 (1968); State v. Carter, 208 Wis. 2d 142, 560 N.W.2d 256 (1997); State v. Church, 2002 WI App 212

[4] North Carolina v. Pearce, 395 U.S. 711 (1969)

WISCONSIN SUPREME COURT
WEDNESDAY, DECEMBER 17, 2003
1:30 p.m.

02-1287-CR State v. Wyatt Daniel Henning

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a judgment of the Racine County Circuit Court, Judge Stephen A. Simanek presiding.

This case involves a man who, while out on bail, was arrested and charged with drug dealing. He was acquitted on the drug counts, but convicted of bail jumping. The bail jumping convictions were overturned by the Court of Appeals because he was not convicted of the underlying crimes. The State now wants to retry him on different charges – simple possession of drugs – arising out of the same incident, and on jumping bail. The Court of Appeals ruled that he could not be retried; the Supreme Court will now consider this matter.

Here is the background: On Jan. 25, 2001, a Burlington police officer became suspicious as he watched a man walk to and from a vehicle parked across the street from a McDonald's restaurant. The officer investigated and found that the car was registered to Wyatt Henning's relatives. Henning was wanted on an outstanding warrant. The officer stopped the car and questioned the occupants. Henning was among them and was arrested. He was carrying a cell phone, a charger, a postal scale, paper with numbers on it, and $30. The officer also found suspected THC and LSD in packages in the back seat.

Henning ultimately was charged with several crimes related to dealing THC and LSD, and jumping bail. The bail jumping charge was based upon the allegations that Henning intended to deliver drugs. Before the jury began deliberations, lawyers for both sides reiterated that the underlying offense for the bail jumping charge was not mere possession, but rather possession with intent to deliver. During deliberations, the jury asked the judge whether Henning could be found guilty of bail jumping based upon simple possession of drugs, rather than possession with intent to deliver. Over the objections of the defense, which argued that the case was built on delivery and not simple possession, the judge answered yes. The jury found Henning not guilty of the drug-dealing charges, but guilty of the bail jumping charges.

Henning appealed, and the Court of Appeals reversed his convictions on the three counts of bail jumping. The Court of Appeals pointed out that the prosecution and defense had stipulated (agreed) from the start on an "all or nothing" approach; that is, Henning would either be found guilty of possession with intent to deliver *and*, therefore, guilty of bail jumping, or he would be acquitted on all charges.

In its appeal to the Supreme Court, the State challenges not the decision to overturn the verdict, but rather the Court of Appeals' order that Henning cannot be retried. The Court of Appeals concluded that a retrial on these charges would violate Henning's constitutional protection against double jeopardy. The Supreme Court will clarify whether the State may retry a defendant under these circumstances.